STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
V	No. 252519 St. Clair Circuit Court
GREGORY ARMSTRONG, Defendant-Appellant.	LC No. 03-001208-FH

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of delivery/manufacture of cocaine less than 50 grams, MCL 333.7401(2)(a)(iv), delivery/manufacture of marijuana, MCL 333.7401(2)(d)(iii), maintaining a drug house, MCL 333.7405(d), and felony-firearm, MCL 750.227b. Defendant was sentenced to concurrent prison terms of 1 year and 4 months to 40 years on the delivery/manufacture of cocaine conviction, 1 year and 11 months to 8 years on the delivery/manufacture of marijuana conviction, and 1 year and 4 months to 2 years on the maintaining a drug house conviction. Defendant was also sentenced to 2 years' imprisonment on the felony-firearm conviction, with credit for 189 days. We affirm.

Defendant was the subject of a three-month investigation by the St. Clair County drug task force. During the course of the investigation, police officers learned that, although defendant's official residence was with his parents, defendant was frequently at the apartment of his girlfriend, Kelli Riehl, and officers came to suspect that drugs were being distributed from Riehl's apartment. Acting pursuant to a search warrant, officers entered the apartment and seized marijuana and cocaine, as well as related contraband and paraphernalia. Many of these items, including a black plastic tray on which defendant's fingerprints were discovered, plastic bags and razor blades, were found in a safe located in the master bedroom.

Defendant first argues that the trial court erred in allowing Riehl to testify as a rebuttal witness and in denying his request for a continuance after her testimony. We disagree. The decision to allow rebuttal testimony and the decision to deny a continuance are within the trial court's discretion, and we review for an abuse of that discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *People v Coy (After Remand)*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

"Rebuttal testimony is that used to contradict, repel, explain, or disprove evidence produced by the other party, tending directly to weaken or impeach the same." *People v Holland*, 179 Mich App 184, 193; 445 NW2d 206 (1989) (citation omitted). It is not proper for a prosecutor to introduce substantive evidence on rebuttal that could have been raised during the prosecutor's case in chief. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). However, the test of whether rebuttal is proper "is not whether evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Figgures*, *supra* at 399 (citations omitted).

On direct examination, defendant testified that Riehl was not his girlfriend, that he had not been to her apartment more than five times in the last two months, and that the black plastic tray belonged to Riehl. Riehl's testimony was properly responsive to this testimony and was, therefore, properly introduced on rebuttal. *Id.* Moreover, we find no abuse of discretion in the trial court's refusal to grant a continuance for the purpose of allowing defendant to have a fingerprint analysis performed on the tray. A motion for an adjournment must be based on good cause and a defendant must show diligent efforts in attempting to obtain the unavailable evidence. *Coy*, *supra* at 18. Here, defendant did not show either good cause or diligence in his handling of the matter. Defendant's theory of the case was, in part, that the items found in the safe were not his. Defendant knew the tray had been retained by the police as evidence before Riehl testified and could have obtained the tray for fingerprint testing in support of his theory at any time before trial. Because defendant has not shown good cause for his failure to have the tray tested for other fingerprints prior to trial, we conclude the trial court did not abuse its discretion in denying the request for a continuance. *Id*. at 17.

Defendant next argues that the trial court abused its discretion in admitting improper drug profile evidence. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

Profile evidence, "a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity," is not admissible as substantive evidence of a defendant's guilt. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999), citing *People v Hubbard*, 209 Mich App 234, 239-240; 530 NW2d 130 (1995). However, expert testimony, including police expert testimony, is permissible to explain the significance of items seized and the circumstances in existence during the investigation of a defendant. *Murray*, *supra* at 53. To admit expert testimony in this regard, the prosecution must show that: (1) the expert is qualified; (2) the evidence will give the trier of fact a better understanding of the evidence or assist the jury in determining a fact in issue; and (3) the evidence is from a recognized discipline. *People v Williams* (*After Remand*), 198 Mich App 537, 541; 499 NW2d 404 (1993). Moreover, the profile testimony, including modus operandi, must be offered for a proper purpose, the profile should not be the only evidence of a defendant's guilt, the jury should be instructed on the proper use of the profile testimony, and the expert should not express an opinion that, based on the profile presented, the defendant is guilty. *Murray*, *supra* at 56-57. In *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991), this Court affirmed the admission of profile evidence in the form of police expert testimony that the quantity of crack cocaine at issue in that case, together with the way the rocks of crack cocaine

were evenly cut, clearly indicated that the defendant intended to sell the drugs and not simply use the drugs for personal consumption.

During trial in the instant case, two officers opined that the amount of marijuana and cocaine recovered appeared to be a dealer's quantity. The officers testified that the plastic bags found in the safe were commonly used as packaging materials for drugs, that the razor blades were commonly used to break larger rocks of crack cocaine into smaller rocks to be packaged for sale, and that it is common for drug dealers to live in one residence and store and sell drugs out of another residence. Both officers were qualified by experience and training to testify as experts in drug trafficking. Narcotics trafficking is a recognized area of expertise. *Williams, supra* at 542. Contrary to defendant's assertion that this testimony constituted improper profile evidence, the trial court did not err in concluding that the challenged testimony about the quantity of marijuana and cocaine would help the trier of fact understand the modus operandi of a drug dealer, a subject not within the layman's common knowledge, and be relevant to the disputed issue of intent. See *Williams, supra* at 542; *Ray, supra* at 708. In addition, the expert testimony that drug dealers will use multiple residences for different purposes was relevant to explain why the drugs at issue were recovered in a safe in the apartment of defendant's girlfriend rather than in defendant's primary residence. Further, contrary to defendant's argument, the officers' testimony did not impermissibly draw the ultimate inference or conclusion for the jury regarding defendant's guilt. "The fact that an expert's opinion may embrace "an ultimate issue" in the case does not make it inadmissible." *Williams, supra* at 542 (citations omitted). In any event, neither officer testified or gave the opinion that defendant was guilty based on profile evidence. Moreover, the complained of drug profile evidence by itself was not "used to establish the link between innocuous evidence and guilt." *Id.* at 57. The prosecutor introduced and argued additional evidence from the case that the jury could use to draw an inference of criminality. This evidence included testimony that defendant was observed in a two-month span meeting suspected buyers in known drug locations, that defendant admitted he knew about the surveillance and anticipated that he would be raided by the police, that defendant admitted to the police the contraband seized in the raid belonged to him, and that defendant wrote Riehl a letter after his arrest instructing her to support his assertion that he never admitted to anything, and to destroy the letter after she had read it. We therefore conclude that, as presented, the limited uses of expert testimony to explain evidence specific to this case did not constitute impermissible substantive evidence of guilt. *Murray, supra* at 55, citing *United States v Quigley*, 890 F2d 1019, 1023 (CA 8, 1989); *Williams, supra* at 542.

Defendant further asserts that the prosecution improperly asked defendant to comment on the credibility of the police expert witnesses, and that this improper questioning exacerbated this improper use of the profile evidence. Defendant failed to object to this line of questioning; therefore, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). While defendant correctly asserts that the prosecution erred by asking defendant to comment on the credibility of other witnesses, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), defendant cannot establish prejudice arising from this error. Substantial evidence supporting the verdicts was properly presented. Further, any prejudice resulting from the question could have been resolved or minimized had defendant objected when the question was posed and requested a curative instruction from the trial court thereafter. *Id*. at 17-18.

We also reject defendant's argument that the trial court abused its discretion in allowing evidence of other acts to be admitted. The trial court permitted a police officer to testify over defendant's objection that the officer had conducted surveillance of defendant in the months before the search warrant was issued, and that this surveillance resulted in the officer believing that defendant was involved in suspected drug transactions. The trial permitted the testimony after concluding that pursuant to MRE 403, although the evidence was prejudicial to defendant, the probative value substantially outweighed the danger of unfair prejudice. We find no error because this evidence was admissible as relevant background information to explain why the officers requested that the search warrant for defendant be issued and served at Riehl's residence. The evidence also was properly admitted to rebut defendant's assertion that he was merely caught in the wrong place at the wrong time. Nor does the evidence implicate MRE 404(b) because it was not offered to show defendant acted in conformity with a particular character trait. *People v Houston*, 261 Mich App 463, 469; 683 NW2d 192, lv gtd in part on other grounds 471 Mich 913 (2004).

Lastly, defendant argues that the trial court abused its discretion in denying the jury's request to review transcripts of the testimony. We disagree. "This Court reviews decisions regarding the rereading of testimony for an abuse of discretion." *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). A trial court abuses its discretion when it denies a jury's reasonable request to rehear testimony and forecloses the possibility that the jury will ever be able to rehear the testimony. *People v Howe*, 392 Mich 670, 677-678; 221 NW2d 350 (1974).

Soon after they retired to consider a verdict, the jury sent the trial court a note inquiring on whether there was a written or recorded copy of the trial testimony. The trial court informed the jury that the testimony would be transcribed, but that it would take a day to type the transcripts. In our judgment, the jury's question was simply an inquiry if testimony in general was available in a written or recorded form. There was no request to be provided specific identified testimony. The trial court answered this question properly by explaining the delay that exists in transcribing trial testimony from the court reporter's notes. Even if this was a request to review certain testimony, the trial court did not abuse its discretion in instructing the jury as it did. The trial court explained that the transcripts were not yet available, but, if need be, they could be made available to the jury. Thus, the trial court did not abuse its discretion as it did not foreclose the possibility that the jury could review the transcripts at some point in the future. *Id.*

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly